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No. 92-765

in the Supreme Court of the United States

OCTOBER TERM, 1992

BANKATLANTIC,
Cross-Petitioner,

v.

PAINEWEBBER INCORPORATED,
Cross-Respondent.

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should invoke its extraordinary supervisory power to review the Eleventh Circuit's affirmance of a district court's rulings on the admissibility of evidence and the permissible scope of closing argument during a jury trial.

2. Whether this Court should invoke its supervisory power to review the Eleventh Circuit's affirmance of a district court's determination that the plaintiff was not entitled to a new trial based upon a single juror's exposure during trial to a "cumulative" and "irrelevant" newspaper article fostered by and quoting plaintiff's counsel.

3. Whether this Court should invoke its supervisory power to review the Eleventh Circuit's affirmance of a district court's determination that, because "a correct response would not have provided a valid basis for a challenge for cause," under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the plaintiff was not entitled to a new trial where a juror had failed to volunteer information on *voir dire*.

PARTIES TO THE PROCEEDING

Cross-petitioner and respondent is BankAtlantic, a federal savings bank.

Cross-respondent and petitioner is PaineWebber Incorporated ("PaineWebber").

DESIGNATION OF CORPORATE RELATIONSHIPS

The following is a list of all subsidiaries of PaineWebber, as well as for any of the corporations listed herein:

AIR TRANSPORT LEASING, INC.
AJ CORPORATION
ATL, INC.
BEDCO LEASING COMPANY, INC.
BEPWI SUB, INC.
BLYTH EASTMAN PAINE WEBBER SERVICING INC.
CAPITAL INVESTMENT & TRUST COMPANY
CHANNELVIEW LEASING COMPANY, INC.
CORRESPONDENCE SERVICES CORPORATION
CT MONROE CORPORATION
DEDICATED PARTNERS INC.
EIGHTH INCOME PROPERTIES, INC.
FIFTH INCOME PROPERTIES, INC.
FIFTH MORTGAGE PARTNERS, INC.
FIRST EQUITY PARTNERS, INC.
FIRST INCOME PROPERTIES FUND, INC.
FIRST INSURED MORTGAGE PARTNERS, INC.
FIRST OPPORTUNITY PARTNERS, INC.
FIRST PW CROW PROPERTIES, INC.
FIRST PW GROWTH PROPERTIES, INC.
FIRST QUALIFIED PROPERTIES, INC.
FOURTH DEVELOPMENT FUND, INC.
FOURTH INCOME PROPERTIES, INC.
FOURTH QUALIFIED PROPERTIES, INC.

GENERAL EQUIPMENT MANAGEMENT, INC.
HARBORSIDE INSURANCE COMPANY HOLDINGS INC.
HARBORVIEW CORPORATION
HOMESTEAD SAVINGS, F.S.B.
KATELLA REALTY CORPORATION
MAIDEN LANE LEASING CORPORATION
MEZZANINE CAPITAL CORPORATION
MITCHELL HUTCHINS ASSET MANAGEMENT INC.
MITCHELL HUTCHINS INSTITUTIONAL INVESTORS, INC.
PAINE HORNELL CORPORATION
PAINE WEBBER AIRCRAFT LEASING INC.
PAINE WEBBER (ASIA) LTD.
PAINE WEBBER BERMUDA LTD.
PAINE WEBBER CHAIRMAN'S INC.
PAINE WEBBER DEVELOPMENT, INC.
PAINE WEBBER FUNDING INC.
PAINE WEBBER FUTURES MANAGEMENT CORPORATION
PAINE WEBBER I. B. HOLDINGS INC.
PAINE WEBBER INCORPORATED OF PUERTO RICO
PAINE WEBBER INTERNATIONAL CAPITAL INC.
PAINE WEBBER LEASING CORPORATION
PAINE WEBBER LONDON HOLDINGS
PAINE WEBBER NIPPON LTD.
PAINE WEBBER PROPERTIES INCORPORATED
PAINE WEBBER REAL ESTATE SECURITIES INC.
PAINE WEBBER REALTY INVESTMENTS INCORPORATED
PAINEWEBBER ADVERTISING ASSOCIATES INC.
PAINEWEBBER AIRCRAFT DEPOSITARY INC.

PAINEWEBBER (B.C.) LIMITED
PAINEWEBBER CAPITAL, INC.
PAINEWEBBER COMMODITIES LIMITED
PAINEWEBBER DEPOSITARY CORPORATION
PAINEWEBBER DIAGNOSTIC, INC.
PAINEWEBBER EMPLOYEE INVESTMENTS MANAGEMENT INC.
PAINEWEBBER FINANCIAL TRADING LIMITED
PAINEWEBBER FRANCE SA
PAINEWEBBER GOLF ADMINISTRATOR, INC.
PAINEWEBBER IBD INC.
PAINEWEBBER INCORPORATED
PAINEWEBBER INTERNATIONAL (ASIA) LTD.
PAINEWEBBER INTERNATIONAL BANK LTD.
PAINEWEBBER INTERNATIONAL BANKING CORPORATION
PAINEWEBBER INTERNATIONAL DEVELOPMENT LTD.
PAINEWEBBER INTERNATIONAL FUTURES (ASIA) LTD.
PAINEWEBBER INTERNATIONAL FUTURES LIMITED
PAINEWEBBER INTERNATIONAL (GREECE) LTD.
PAINEWEBBER INTERNATIONAL INC.
PAINEWEBBER INTERNATIONAL (JAPAN) INC.
PAINEWEBBER INTERNATIONAL (LONDON) LTD.
PAINEWEBBER INTERNATIONAL OVERSEAS LIMITED
PAINEWEBBER INTERNATIONAL, S.A.
PAINEWEBBER INTERNATIONAL (U.K.) LTD.
PAINEWEBBER INVESTMENTS HOLDINGS INC.

PAINEWEBBER INVESTMENTS INC.
PAINEWEBBER LIFE HOLDINGS INC.
PAINEWEBBER MORTGAGE
ACCEPTANCE INC. III
PAINEWEBBER MORTGAGE
ACCEPTANCE INC. IV
PAINEWEBBER MORTGAGE FINANCE
HOLDING CO.
PAINEWEBBER MORTGAGE FINANCE, INC.
PAINEWEBBER PARTNERS INC.
PAINEWEBBER PROGRAMMED
AMORTIZATION TERM SECURITIES INC.
PAINEWEBBER SPECIALISTS
INCORPORATED
PAINEWEBBER T.C., INC.
PAINEWEBBER TRADING INC.
PAINEWEBBER UK HOLDINGS
PAINEWEBBER (UK) PENSION TRUSTEES
LIMITED
PAINEWEBBER VENTURE
MANAGEMENT INC.
PW CAPITOL CORPORATION
PW CHAMPLAIN CORPORATION
PW CLOVER HOLDINGS I, INC.
PW CLOVER HOLDINGS II, INC.
PW CLOVER INC.
PW ENTERTAINMENT INC.
PW FAWCETT CORPORATION
PW FITCHBURG CORPORATION
PW FRANKLIN CORPORATION
PW FREMONT CORPORATION
PW GENEVA CORPORATION
PW HAMILTON CORPORATION
PW IDLEWILD CORPORATION
PW INSURANCE AGENCY (ARKANSAS)
INCORPORATED
PW INSURANCE AGENCY OF PUERTO
RICO, INC.

PW INSURANCE AGENCY (OHIO) INCORPORATED
PW INTERNATIONAL INCORPORATED OF PUERTO RICO
PW KATELLA CORPORATION
PW LINCOLN HARBOR INC.
PW MAIN CORPORATION
PW McCULLOUGH CORPORATION
PW NORTHWESTERN CORPORATION
PW PARTNERSHIPS
PW PLAZA CORPORATION
PW SHELTER FUND, INC.
PW SPRING MOUNTAIN CORPORATION
PW TREASURY FUNDING INC.
PW TRUST COMPANY
PW WESTVILLE CORPORATION
PWDC HOLDING COMPANY
PWJC INSURANCE SALES (ARIZONA) INCORPORATED
PWJC INSURANCE SALES INCORPORATED
PWJC INSURANCE SALES (MASSACHUSETTS) INC.
PWJC INSURANCE SALES (MONTANA) INC.
PWJC INSURANCE SALES (WYOMING) INC.
PWJC INSURANCE SERVICES (ILLINOIS) INC.
PWJC SALES AGENCY INCORPORATED
PWPR CORPORATION
REALTY SOUTHWEST INVESTMENT GROUP INC.
REALTY SOUTHWEST INVESTMENT GROUP III INC.
REALTY SOUTHWEST SERVICES INC.
REGIONAL S & L INVESTORS, INC.
RM BRANFORD CORPORATION
RMA INSURANCE CO.
RML LEASING CORPORATION
RMM CORPORATION
RMZ CORPORATION

ROTAN MOSLE ENERGY
DEVELOPMENT INC.
ROTAN MOSLE ENERGY INC.
ROTAN MOSLE FINANCIAL CORP.
ROTAN MOSLE INSURANCE AGENCY, INC.
ROTAN MOSLE INVESTMENTS INC.
ROTAN MOSLE INVESTMENT
VENTURES INC.
ROTAN MOSLE LEASING COMPANY
ROTAN MOSLE REALTY ADVISORS, INC.
ROTAN MOSLE REALTY ASSOCIATES, INC.
ROTAN MOSLE REALTY
INVESTMENTS, INC.
ROTAN MOSLE TECHNOLOGY, INC.
SECOND EQUITY PARTNERS, INC.
SECOND INCOME PROPERTIES, INC.
SECOND PW GROWTH PROPERTIES, INC.
SECOND QUALIFIED PROPERTIES, INC.
SEVENTH INCOME PROPERTIES
SIXTH AVENUE REALTY CORPORATION
SIXTH INCOME PROPERTIES, INC.
THIRD EQUITY PARTNERS, INC.
THIRD INCOME PROPERTIES, INC.
THIRD PW GROWTH PROPERTIES, INC.
THIRD QUALIFIED PROPERTIES, INC.
TRAVEL PLAZA MANAGEMENT, INC.
WALL STREET REALTY CORPORATION
WYODAK CONSTRUCTION CO. INC.

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioner and cross-respondent PaineWebber submits this brief in opposition to BankAtlantic's cross-petition for writ of certiorari. The cross-petition presents scandalous and impertinent attacks on the honesty and integrity of the lawyers, jurors, witnesses, and judges involved in this case and does not justify an acknowledgement by this Court much less an exercise of the Court's extraordinary power of supervision.[1]

[1] Accordingly, PaineWebber respectfully suggests, pursuant to Supreme Court Rule 24.6, that BankAtlantic's cross-petition be stricken from court files. *See Cox v. Wood*, 247 U.S. 3 (1918); *Green v. Elbert*, 137 U.S. 615 (1891).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 955 F.2d 1467 (11th Cir. 1992) and is set out in the appendix to PaineWebber's petition at A-3.[2] The Eleventh Circuit's denial of rehearing on July 2, 1992 is included in PaineWebber's appendix at A-1.

The relevant decisions of the district court are the October 27, 1989 memorandum order on admissibility of testimony regarding Alan Levan's business transactions, ownership interests and income from BankAtlantic, App. B; the January 19, 1990 omnibus order denying BankAtlantic's motion for judgment notwithstanding verdict or new trial, A-35-9; the final judgment in the case entered January 26, 1990, A-34; the March 8, 1990 order setting an evidentiary hearing regarding juror misconduct, App. D; and the August 14, 1992 order denying BankAtlantic's motion for new trial and supplemental motion for new trial, App. C.

REGULATIONS INVOLVED

BankAtlantic omits the following rules and regulations relevant to the disposition of its petition:

Local Rule 21A(7) of the United States District Court, Southern District of Florida states:

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[2] References to "A — " are to the petitioner/cross-respondent PaineWebber's appendix in the related case before this Court, case no. 92-571. References to "App. " are to cross-petitioner BankAtlantic's appendix in this case.

RULE 21. RELEASE OF INFORMATION IN CRIMINAL AND CIVIL PROCEEDINGS

A. By Attorneys.

7. A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

a. Evidence regarding the occurrence or transaction involved.

b. The character, credibility, or criminal record of a party, witness, or prospective witness.

c. The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

d. His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

e. Any other matter reasonably likely to interfere with a fair trial of the action.

Rule 4-3.6 of the Rules Regulating the Florida Bar states:

RULE 4-3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should

know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. A lawyer shall not counsel or assist another person to make such a statement. Prosecutors and defense counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a criminal case from making extrajudicial statements that are prohibited under this rule.

STATEMENT OF THE CASE

I. BACKGROUND

BankAtlantic's statement of the case is wholly argumentative, replete with irrelevant and scandalous matter, and does not accurately set forth the facts. PaineWebber, as obligated under the rules of this Court, sets out below a corrected statement of all material facts.

PaineWebber is a financial services company incorporated and located in New York. BankAtlantic is a federal savings and loan association located in Fort Lauderdale, Florida. At the time of this litigation, BankAtlantic was one of the largest savings and loan institutions in Florida and in the United States. A-9.

In 1984, BankAtlantic retained PaineWebber as a financial advisor and to assist it in blocking several hostile takeover attempts. A-9, 105-110. One such takeover attempt was led by Alan Levan, BankAtlantic's present chairman of the board and chief executive officer. R 60-667-(21,31); R 63-670-17. PaineWebber was successful in defending BankAtlantic from Levan's takeover attempt. R 60-667-70.

During this time, BankAtlantic also contacted a number of brokerage houses to broker interest rate swaps on its

behalf. R 49-656-(40-42); R 56-663-30.[3] Interest rate swaps were recommended by the Federal Home Loan Bank Board as a prudent tool to assist savings and loans in managing interest rate risk. R 49-656-(83-85, 87); R 63-670-(248-249); R 64-671-51.

BankAtlantic entered into two interest rate swaps with Homestead Savings & Loan Association of California. A-9-10, 92, 111-130. PaineWebber was the broker in the two swaps. A-9.

BankAtlantic, claiming nonperformance under the advisor agreement, terminated the services of PaineWebber as its financial advisor and employed another firm to assist with the swaps. A-10. At this time, interest rates were falling drastically allegedly causing BankAtlantic to suffer losses on the swaps in excess of $30 million. A-10, 93.

After PaineWebber was terminated, Alan Levan, one of the corporate raiders PaineWebber was hired to keep out, gained control of BankAtlantic. BankAtlantic's cross-petition at 6 n.3. In August 1987, BankAtlantic, under Levan-led management, sued PaineWebber claiming losses caused by PaineWebber's failure to disclose risks involved in interest rate swaps. A-10. The complaint alleged breach of the financial advisor contract, breach of fiduciary duty, fraud, fraudulent concealment, negligence and negligent misrepresentation. *Id.*

Specifically, BankAtlantic claimed it purchased the interest rate swaps to guard, or "hedge," against rising interest rates. A-89-90. BankAtlantic alleged that PaineWebber failed to adequately warn that, if interest rates

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[3] An interest rate swap is an agreement by which one party agrees to pay the counter-party a fixed rate of interest on a notional amount for a specified period of time. In return, the counter-party agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

fell, the high-yielding fixed rate mortgages to which the swaps were matched would prepay. A-10, 90-91.

Further, BankAtlantic contended that PaineWebber failed to disclose its extensive relationship with Homestead or that Homestead was not creditworthy. Therefore, BankAtlantic should have been advised to obtain collateral from Homestead.[4] A-10, 92. The absence of collateral, BankAtlantic claimed, made the swaps unsalable in the secondary market.

II. THE EVIDENCE AT TRIAL

Although BankAtlantic alleged that it incurred "staggering" losses, substantial evidence was adduced during the five week jury trial that there was no loss, damage or injury. BankAtlantic's chief financial officer, Herbert Stangl, testified that BankAtlantic suffered no loss as a result of the swaps. R 58-665-(62-63, 66-69). He stated that BankAtlantic's loss was "zero," as reflected in the bank's published consolidated financial statements. *Id.* Those financial statements noted that the effect of the interest rate swaps was

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[4] BankAtlantic argues as fact that a hidden relationship between Homestead and PaineWebber existed which was so significant that PaineWebber and its former counsel withheld documents to prevent its disclosure. This same claim of hidden documents led to a Fed.R.Civ.P. 37 sanction against PaineWebber and its former counsel.

At trial, when it became clear that BankAtlantic was well aware of PaineWebber's relationship with Homestead, A-13, R 45-652-214, R 56-663-(72-73), BankAtlantic took the position that these documents were "irrelevant and did not add anything to the case." R 61-668-200. In truth, the "irrelevant" documents supposedly hidden did not belong to PaineWebber and were never properly requested. The propriety of the Rule 37 order which is prominently featured by BankAtlantic is presently before the Eleventh Circuit, not this Court.

"insignificant." Def. Exh. 319 at 31. In explaining why there was no loss, Stangl testified:

Q. Why is there no loss, sir?

A. Well, the accounting assumption is that there are assets of equal value to offset the rate swap in the same dollar amount and that movement in the interest rates would affect both sides equally.

Q. Isn't it a fact, sir, the interest payments that Atlantic Federal might have made to the counter party to Homestead only represent the expense side of that equation?

A. Yes, sir.

Q. And there is another side to the equation; correct, sir?

A. Yes.

Q. That is the mortgage side, that is the income side?

A. That's correct.

R 58-665-67.[5]

Substantial evidence was also introduced to support the jury's eventual finding that there was no breach of fiduciary duty, negligence or fraud by PaineWebber with regard to the two interest rate swaps. BankAtlantic's own management testified that the allegedly undisclosed risks — that interest rates fluctuate and mortgages prepay — were well known to BankAtlantic and thoroughly discussed. A-13; *see, e.g.*, R 45-652-(174-180); R 47-654-41; R 49-656-8;

[5] Following Stangl's testimony, BankAtlantic withheld Stangl's pension benefits. R. Supp. 5-799-6. BankAtlantic then sued Stangl in retaliation for allegedly disclosing "trade secrets" by testifying in this case. *Id.*

R 58-665-(32, 37).[6] In addition, PaineWebber's witnesses testified that the risks were in fact disclosed and discussed. R 56-663-(40-42, 62-63).

Donald Streeter, the president and chairman of the board of BankAtlantic at the time the swaps were entered (and BankAtlantic's first witness), testified that BankAtlantic was well aware of these risks. A-13. Streeter testified that he and Gerald Roberts, BankAtlantic's senior vice-president, discussed all possible scenarios with respect to the interest rate swaps. *Id.*; R 45-652-174. A full presentation was made to BankAtlantic's board of directors in January 1984 at which the board considered all possibilities, including the effect on BankAtlantic of rising and falling interest rates, both with and without interest rate swaps in place. A-13; R 45-652-(175-80).

There also was substantial evidence to refute BankAtlantic's claim that Homestead was an uncreditworthy swap partner and that PaineWebber should have advised BankAtlantic to obtain collateral from Homestead. A-13. The chairman of the board of Homestead, Lawrence Weissberg, testified that Homestead had been in

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[6] In a September 1983 offering circular for the sale of its stock to the public, BankAtlantic stated that if interest rates went up, mortgage prepayments would decrease, and that if interest rates went down, mortgage prepayments would increase. Def. Exh. 187 A at 18. BankAtlantic's offering circular disclosed that the average life of its 30-year mortgages had been only seven to ten years. *Id.*; R 63-670-(73-74).

business for over 100 years and that it continued to be profitable throughout the 1980s. *Id.*; R 62-669-23. As Weissberg stated, any suggestion that Homestead was not creditworthy was "ridiculous." *Id.*[7]

In addition, Jim Hunter, BankAtlantic's chief investment officer, and Walid Chammah of PaineWebber, testified that it was BankAtlantic which refused to enter into a collateralized swap. A-13-14; R 50-657-47; R 56-663-(45-46). Streeter, BankAtlantic's president, also testified that no one at BankAtlantic ever felt collateral was needed. A-14; R 45-652-(218-19).

BankAtlantic's final charge was that the failure to secure collateral from Homestead exposed BankAtlantic to an unnecessary risk because the swap transactions were "unsalable in the secondary market." The evidence established that in September 1984 BankAtlantic could have made a one million dollar profit by accepting Citibank's offer to purchase the swaps, but BankAtlantic refused the offer because the amount was "not enough." R 59-666-36.

III. THE JURY VERDICT AND POST TRIAL PROCEEDINGS

A. BankAtlantic's First New Trial Motion: Levan's Financial Interest

On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber. A-10, 40. On December 8, 1989, not waiting for the entry of the final judgment which occurred on January 26, 1990, A-34,

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[7] BankAtlantic also asserted that PaineWebber failed to disclose its prior relationship with Homestead. Streeter, BankAtlantic's president, admitted, however, that in February 1984 PaineWebber disclosed that it had recently brokered a $125 million CD offering for Homestead. A-13; R 45-652-214. Walid Chammah, of PaineWebber, also testified that he told BankAtlantic that PaineWebber had previously brokered several interest rate swaps to which Homestead was a party. R 56-663-(72-73).

BankAtlantic filed its first motion for new trial pursuant to Fed.R.Civ.P. 50 and 59. R 35-687; R 37-697.

BankAtlantic's motion charged PaineWebber and its counsel with jury tampering, subornation of perjury, and flat out "lying." R 35-687. BankAtlantic's eighty-five page memorandum, however, argued weight of the evidence, that the district court had erred by allowing PaineWebber to question BankAtlantic's chairman of his income from the bank, and that the court had erred in allowing PaineWebber to refer to that testimony in closing, despite the lack of objections at the time. R 37-697.

The district court denied BankAtlantic's motion in an order dated January 19, 1990.[8] A-35. With respect to BankAtlantic's claim of error in allowing evidence of financial interest, the district court noted that the issue had been fully briefed several times and that it had "afforded *both* parties great latitude in submitting evidence for consideration to the jury." A-36 (emphasis added). Accordingly, the court stood by its previous ruling that the financial interest evidence was proper under the authority of *Davis v. Alaska*, 415 U.S. 308 (1974). *Id.*

Finally, the district court absolutely disagreed with BankAtlantic's contention that PaineWebber's closing argument was improper: "In particular, we disagree with Plaintiff's characterization of Defendant's closing argument and therefore reject this argument as grounds for post-trial relief." A-37 n.3.

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[8] The court denied BankAtlantic's weight of the evidence argument holding that considering all of BankAtlantic's arguments and the full record of trial and pretrial proceedings, the "cause presented the classic dispute for trial by jury. The parties introduced substantial evidence from which the jury reasonably found for Defendant. It is not for the Court to second-guess the jury's resolution of factual issues." A-36.

B. BankAtlantic's Newspaper Article

During trial, a newspaper article entitled "A Big Week for BankAtlantic" was published in the *Miami Review*. R 39-736-Exh. B. The article reports primarily on a suit between BankAtlantic and a minority shareholder.

The sole contributors to the article are BankAtlantic, its counsel, and experts who explain that BankAtlantic "has got many good things going for it," "doesn't display the classic danger signs of an endangered thrift," and "[a] lot of institutions would kill to have [numbers] like [BankAtlantic's]." *Id.* BankAtlantic's counsel, Eugene Stearns, is quoted as stating that any problems BankAtlantic does have are in part a result of its "having to overcome the obstacle of" the $30 million fraud allegedly perpetrated by PaineWebber. *Id.* The article never presents PaineWebber's version.

Immediately after BankAtlantic's article hit the newsstands, PaineWebber filed a motion to sanction BankAtlantic and its counsel for participating in such an article during trial, in disregard of all published rules of professional conduct. BankAtlantic's cross-petition at 14; R 66-673-2. PaineWebber then requested the court to inquire of the jurors' exposure to the article and to provide the appropriate instruction. *Id.*

C. BankAtlantic's Second and Third New Trial Motions: Jury Misconduct

On February 13, 1990, pursuant to Fed.R.Civ.P. 60(b)(2), and on the ground of "newly discovered evidence," BankAtlantic served its second motion for new trial arguing that the jury had purportedly read its newspaper article which now was prejudicial to BankAtlan-

tic.[9] The district court, pursuant to the rule of *Smith v. Phillips*, 455 U.S. 207 (1982) and *Remmer v. United States*, 347 U.S. 227 (1954), interviewed each juror and held an evidentiary hearing. App. 38a.

Seven of the eight jurors repeatedly and emphatically denied learning anything about BankAtlantic's article. R Supp. 4-761-(8-9, 11-13, 14-16, 18-21, 22-24, 28-30, 31). Only one juror had *any* knowledge of the substance of BankAtlantic's article during trial.

This juror, Anthony Lippert, "glanced at" the article and decided it had nothing to do with this case. *Id.* at 34-35, 40. No juror discussed the substance of the article, and no juror, other than Lippert, learned anything of its contents.[10] *Id.* at 8-32. the article had no effect on any juror's deliberations. *Id.* at 9, 13, 16, 20-21, 25-26, 30, 32.

On April 16, 1990, while the court considered BankAtlantic's newspaper article motion for new trial,

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[9] BankAtlantic misrepresents to this Court that it did not learn a juror had become exposed to its article until another article was published by the *Miami Review* on February 5, 1990. Mr. Stearns has previously sworn in court that he had discussions with the *Miami Review* throughout the case *and* that he learned from the *Miami Review* of juror Lippert's exposure to the first article on February 2, 1990. App. 38a; R 39-736-Exh. C.

Despite learning of this information seven days prior to the last date for filing a Rule 59(b) motion for new trial, BankAtlantic allowed the time for a Rule 59 motion to expire, and filed a Rule 60(b)(2) motion on February 13, 1990. R 39-736. Rule 60(b)(2), however, is jurisdictionally limited to newly discovered evidence which could not have been discovered before the time for filing a Rule 59 motion has expired. Fed.R.Civ.P. 60(b)(2).

[10] Lippert saw the article at an office where he uses space. According to BankAtlantic, the office is owned by an attorney who attended the University of Miami Law School beginning a year earlier than one of PaineWebber's attorneys. BankAtlantic's repeated charges that this attorney therefore was a "classmate" of PaineWebber's counsel who deliberately influenced juror Lippert against BankAtlantic are frivolous.

BankAtlantic scoured the public records and filed yet a third motion for new trial, pursuant to Fed.R.Civ.P. 60(b)(2). BankAtlantic claimed that juror Lippert had lied on *voir dire* by not volunteering that he had a real estate license.[11] R Supp. 4-766A, 766B.

Juror Lippert was retired after twenty-two years as an engineer for AT&T. Lippert also held a license to sell real estate. On *voir dire*, Lippert was asked by the court: "What is your occupation?" He replied: "Recently retired from AT&T." R 44-651-35. Although BankAtlantic had considered asking the jurors whether they held a real estate license, R 29-581-6, it did not do so.

On August 14, 1990, the district court denied BankAtlantic's second and third motions for new trial. App. C. The court determined that (1) only one of the eight jurors deliberating had read the article; (2) the jury never discussed the substance of the article; (3) none of the jurors, save the one who had read it, had any knowledge of the article's substance; (4) the juror who had read the article believed it had nothing to do with the case; and (5) the article contained nothing prejudicial to BankAtlantic.[12] Accordingly, the district court held that not even a "reasonable possibility of prejudice to Plaintiff" existed. App. 34a.

The district court applied the standard enunciated in *McDonough Power Equipment, Inc. v. Greenwood*,

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[11] In this third motion, BankAtlantic also argued that another juror had lied, by not revealing a default judgment for $642.73 and misdemeanors on *voir dire*. R Supp. 4-766A-(7-8). That ground is not raised here.

[12] In its cross-petition, BankAtlantic misrepresents that the district court had excluded some information within the newspaper article expressly due to its "prejudicial" nature. BankAtlantic has already been twice rebuked for making such statements when in fact the district court had specifically excluded the information because it "was irrelevant, not because it was prejudicial." A-17; App. 33a.

464 U.S. 548 (1984), in denying BankAtlantic's demand for a new trial, on the ground that juror Lippert allegedly gave an untruthful answer on *voir dire*.[13] The court assumed for the purposes of BankAtlantic's motion that the juror's answer had been dishonest. App. 34a-35a. Following *McDonough*, the district court held that BankAtlantic could not receive a new trial because even a correct response by juror Lippert would not have supported a challenge for cause. *Id.*

IV. THE ELEVENTH CIRCUIT'S OPINION

BankAtlantic brought up on appeal to the Eleventh Circuit the same arguments it made below and which it now claims justify the extraordinary intervention of this Court. On March 23, 1992, the Eleventh Circuit rendered its opinion. A-3.

The Eleventh Circuit, in affirming each of the district court's rulings denying BankAtlantic a new trial, "methodically"[14] examined the entire "voluminous record," the appropriate standards of review, and the appropriate legal tests for the issues raised.[15] Reviewing BankAtlantic's assertions

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[13] *McDonough*, 464 U.S. 548, established the standard for granting a new trial in cases where pertinent information was not disclosed on *voir dire*. The test is two-pronged, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

[14] BankAtlantic's claim that the Eleventh Circuit participated in a criminal conspiracy against it is two-faced. Here, BankAtlantic argues conspiracy. Meanwhile, in BankAtlantic's most recent filing before the Eleventh Circuit, BankAtlantic attempts to uphold the erroneous Rule 37 sanction mentioned, *supra*, by telling the court that it was correct in "methodically affirm[ing] each and every ruling of the district judge." BankAtlantic's brief in opposition to PaineWebber's appeal to overturn Rule 37 sanction, case nos. 91-5613, 91-5919, at 23 n.8.

[15] BankAtlantic, below and in its cross-petition to this Court, fails to mention the appropriate standards of review and legal prerequisites of its claims.

of attorney misconduct — the financial interest evidentiary rulings of the trial judge and PaineWebber's consequent closing argument — the Eleventh Circuit noted it could "not disturb a district court's rulings absent a clear showing of an abuse of discretion." A-20 (citations omitted).

The court further noted that the "trial judge is given broad discretion in controlling counsel's arguments. Absent an abuse of discretion, the decision of the trial court which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed." *Id.* (quotation omitted).

Reviewing the record, the Eleventh Circuit determined that the testimony elicited from Levan, and PaineWebber's closing argument comments about that testimony, were directly relevant to PaineWebber's defense and also show Levan's "bias or interest in the outcome of the case." A-21-22. Specifically, the evidence and references to Levan's income and dividend payments supported PaineWebber's claim that "Levan and his associates consciously sold the mortgages matched in the interest rate swaps." A-21.

The court quoted this Court's opinion in *Davis v. Alaska*, 415 U.S. 308, 316 (1974), and held that the evidence about Levan was proper because it was relevant to PaineWebber's defense, and "[t]he partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." A-22.

The court held that the closing arguments were also proper because "they did not appear to be references to matters outside the record. Rather, PaineWebber's closing argument was based on evidence that was largely adduced from BankAtlantic's own witnesses." A-21.

The Eleventh Circuit was similarly methodical as to BankAtlantic's claim to a new trial on the ground a juror

had read BankAtlantic's newspaper article. The Eleventh Circuit first recognized that "[t]he factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" A-15 (quoting *Marshall v. United States*, 360 U.S. 310, 312 (1959) and *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990)).

The court then determined that the trial evidence, along with the jurors' post-trial testimony, supported the district court's determination that BankAtlantic was not prejudiced. A-17. Accordingly, the Eleventh Circuit held that "the district court did not abuse its 'large discretion' in concluding that the juror's consideration of the extrinsic evidence did not taint the jury's deliberations and require a new trial." *Id.* (citation omitted).[16]

Finally, the Eleventh Circuit dismissed BankAtlantic's claim premised on a purported false answer by juror Lippert to a question on *voir dire*. The court agreed with the district court that it was unnecessary to determine whether juror Lippert had been honest and that *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), was controlling. Because a truthful answer would not have given rise to a challenge for cause or shown "actual bias," the district court did not abuse its discretion in denying the motion for new trial. A-19.

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[16] The Eleventh Circuit applied *United States v. Rowe*, 906 F.2d 654 (11th Cir. 1990) and *United States v. Bolinger*, 837 F.2d 436 (11th Cir.), *cert. denied*, 486 U.S. 1009 (1988), which in turn specifically adopt and apply the holdings of this Court in *Smith v. Phillips*, 455 U.S. 207 (1982), *Sheppard v. Maxwell*, 384 U.S. 333 (1966), *Marshall v. United States*, 360 U.S. 310 (1959), and *Dennis v. United States*, 339 U.S. 162 (1950), on whether jurors' exposure to extraneous influences during trial require a new trial.

SUMMARY OF ARGUMENT

BankAtlantic, as it has done throughout, puts the blame for the adverse verdict on others instead of on the failure of its case. This time, BankAtlantic says it was done in by a criminal conspiracy involving PaineWebber's counsel, the entire jury led by a renegade foreman, a district court judge whose "imminent departure from the bench . . . caused him to lose enthusiasm for pursuing the wrongdoing," and the Eleventh Circuit which became a willing participant because the judge who wrote the panel's opinion was "a senior member of the same district court as the trial judge in this case." BankAtlantic's cross-petition at 16.

BankAtlantic charges that the combined jury and attorney misconduct, in which the trial judge and the Eleventh Circuit joined, renders the denial of a new trial so unfair as to constitute a departure from the accepted and usual course of judicial proceeding and calls for an exercise of this Court's power of supervision.

BankAtlantic's petition presents no issue arguably deserving of this Court's time. Despite BankAtlantic's scandalous and impertinent accusations, the only real issues raised are typical evidentiary, factual and legal rulings made during the course of any jury trial. Each ruling was correctly decided by the district court and affirmed by the Eleventh Circuit applying Supreme Court precedent.

There is no secret conspiracy against BankAtlantic. The Eleventh Circuit and district court have not abused their broad discretion. In no event has a departure from the usual course of proceedings occurred. BankAtlantic's cross-petition should be denied.

ARGUMENT

I. JUROR MISCONDUCT

BankAtlantic barrels with abandon through its juror misconduct arguments as if no court had ever addressed these issues. As PaineWebber, the district court and Eleventh Circuit have repeatedly reminded BankAtlantic, however, its shrill rhetoric cannot defeat binding precedent.

For example, BankAtlantic argues that the district court and Eleventh Circuit erred by determining that juror Lippert's purportedly false answer to a question on *voir dire* does not entitle BankAtlantic to a new trial. BankAtlantic makes this argument despite the fact that both the district court and Eleventh Circuit *assumed* that the juror's *voir dire* answer was false but held that the test set out by this Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) required a finding that BankAtlantic was not entitled to a new trial. BankAtlantic does not cite *McDonough* or bring it to this Court's attention. *McDonough* was correctly followed.

BankAtlantic's cry of manifest injustice is even less appropriate with regard to its claim to a new trial based on the jury's purported exposure to a newspaper article participated in and quoting none other than BankAtlantic's own trial counsel, Eugene Stearns. Surprisingly, this contention takes up most of BankAtlantic's discussion of why this Court should accept its cross-petition. Basically, BankAtlantic claims that in this case, the Eleventh Circuit, not for the first time, "has completely overlooked the express provisions of [Fed.R.Evid.] Rule 606(b)" by permitting a district court to consider testimony of a juror that extrinsic information was harmless. BankAtlantic's cross-petition at 19.

Again, BankAtlantic fails to tell this Court that the district court's evidentiary hearing and questions of the jurors specifically follow the teachings of this Court in *Smith*

v. Phillips, 455 U.S. 207 (1982), and *Remmer v. United States*, 347 U.S. 227 (1954), including that a juror is "well qualified to say whether he has an unbiased mind" after having been exposed to an extraneous influence that might theoretically affect his vote.[17] *Smith v. Phillips*, 455 U.S. at 217 (quoting *Dennis v. United States*, 339 U.S. 162, 171 (1950)). BankAtlantic does not cite these cases at all.[18]

Moreover, in the case at bar, the district court's decision and the Eleventh Circuit's affirmance did not even turn on the objected to juror testimony. The basis for the rulings was the determination that the newspaper article quoting BankAtlantic's counsel was merely cumulative and irrelevant, rather than prejudicial, and that only one juror was exposed to the substance of this article. A-16-17; App. 33a. Accordingly, whether the district court was allowed under Federal Rule of Evidence 606(b) to consider the jurors' testimony had no effect on BankAtlantic's entitlement to a new trial.

Recognizing this deficiency in its argument, BankAtlantic boldly misrepresents that the information within the article was excluded from evidence at trial expressly because it was "prejudicial." BankAtlantic's cross-petition at 13. The district court and Eleventh Circuit, in

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[17] In *Smith v. Phillips*, 455 U.S. 207, this Court rejected the same argument that BankAtlantic makes here. As this Court stated, "[r]espondent correctly notes that determinations made in *Remmer*-type hearings will frequently turn upon testimony of the juror in question, *but errs in contending that such evidence is inherently suspect.*" *Id.* at 217 n.7 (emphasis added).

[18] Even *Mattox v. United States*, 146 U.S. 140 (1892), which BankAtlantic does cite, supports the decisions rendered below. There, the Court quoted *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1852), where it was held that no new trial could be had where "[t]here was nothing in the newspapers calculated to influence [the jurors'] decision, and both of them swear that these papers had not the slightest influence on their verdict." *Id.*

response to this same misrepresentation BankAtlantic made twice before held that the information was excluded expressly because it was "irrelevant," *not* prejudicial. A-17 n.4; App. 33a.

The Eleventh Circuit, relying on this Court's decision in *Marshall v. United States*, 360 U.S. 310 (1959), and *United States v. Rowe*, 906 F.2d 654 (11th Cir. 1990), properly held that the "factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's 'large discretion.'" A-15. BankAtlantic cannot in good faith argue that the district court abused its discretion in making these findings and that the great weight of the evidence was to the contrary. The district court and Eleventh Circuit clearly did not depart from the accepted course of proceedings.[19]

II. ATTORNEY MISCONDUCT

BankAtlantic asserts it is entitled to a new trial because of "attorney misconduct" consisting of "attacks" on BankAtlantic's chairman, Alan Levan, on direct examination and during closing argument. In reality, there is nothing in the record which plausibly could be called "attorney misconduct."

BankAtlantic actually complains of an evidentiary ruling by the district court. The district court and the Eleventh Circuit held, on the basis of this Court's decision, *Davis v. Alaska*, 415 U.S. 308 (1974), that PaineWebber was entitled to question witness Levan about his bias and financial interest in the outcome of the case. A-21-22; App. 26a-27a.

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[19] Additionally, although not addressed by the Eleventh Circuit, because BankAtlantic concededly discovered the ground for this motion for new trial on "newly discovered evidence" prior to the expiration of the time for it to file a Fed.R.Civ.P. 59 motion, R Supp. 3-743A-4; 3-746-(1-2), the district court lacked the jurisdiction to consider BankAtlantic's Fed.R.Civ.P. 60(b)(2) motion. *See* Fed.R.Civ.P. 60(b).

Again, BankAtlantic does not mention the controlling and relied upon Supreme Court decision.[20]

In short, the alleged "attorney misconduct" consists entirely of questions asked by PaineWebber directly relevant to its defense, and references to the answers in closing argument.[21] Plainly, the Eleventh Circuit was well within its broad discretion in denying BankAtlantic's motion for new trial on this ground.

III. ORCHESTRATED MISCONDUCT

Finally, there is BankAtlantic's new claim, that PaineWebber's counsel "orchestrated" all of the purported attorney and jury misconduct — that PaineWebber planted BankAtlantic's newspaper article and then pandered to the jury in closing argument, knowing that the jury had become predisposed against BankAtlantic. Not to mention that the district court and Eleventh Circuit joined in this criminal conspiracy and "demonstrated little concern about the egregious and intentionally orchestrated attorney and jury misconduct. . ." BankAtlantic's cross-petition at 2 n.1.

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[20] BankAtlantic also fails to mention the leeway evenly granted to both parties at closing argument. For example, BankAtlantic's counsel referred to PaineWebber's representatives as "snake oil salesmen" and appealed to the jury's prejudice by suggesting that PaineWebber was responsible for the decline in America's might at the hands of the Japanese. R 66-673-(64, 76, 142). He even attacked PaineWebber's counsel personally, calling PaineWebber's counsel's argument "stupid." R 66-673-138.

[21] The district court and Eleventh Circuit agreed that the testimony elicited was directly relevant to PaineWebber's defense, including that Levan and his people consciously sold the mortgages matched against the interest rate swaps to create profits justifying the amounts they had taken out of the bank. A-21-22; App. 27a. PaineWebber's closing argument, moreover, only referenced matters within the record, and "was based on evidence largely adduced from BankAtlantic's own witnesses." A-21.

Not a scintilla of evidence exists to support BankAtlantic's libelous accusations. Indeed, the uncontroverted facts in the record are that the article was promoted by Eugene Stearns, counsel for BankAtlantic, who is quoted in the article extensively. R 39-736-Exh. B.

PaineWebber, as soon as the article hit newsstands, filed a motion to sanction BankAtlantic and its counsel for participating in such an article during trial in violation of all published rules of professional conduct. R 66-673-2; *see* United States District Court, Southern District of Florida, Local Rule 21A(7); Rules Regulating the Florida Bar, Rule 4-3.6. PaineWebber then requested the court to inquire of the jurors' exposure to the article and to provide the appropriate instruction.

BankAtlantic's claim of injustice premised on its own misconduct turns all traditional notions of justice upon their collective heads. Except as an occasion to sanction BankAtlantic, this coffee table petition intended only to assuage the ego of BankAtlantic's chairman, Alan Levan, should not be accepted by this Court.

CONCLUSION

For the reasons stated herein, cross-respondent PaineWebber requests that this Court deny BankAtlantic's cross-petition seeking review of the jury verdict and opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. It is further suggested that BankAtlantic's petition be stricken from court files due to its scandalous and impertinent nature.

Respectfully submitted,

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